U.S. Department of Labor

Office of Administrative Law Judges
603 Pilot House Drive - Suite 300
Newport News, VA 23606-1904

(757) 873-3099
(757) 873-3634 (FAX)

Issue date: 10Oct2002

Case No. 2001-LHC-1111

OWCP No. 5-109537

In the Matter of

NOLEN P. EVANS,
Claimant
v.

VIRGINIA INTERNATIONAL TERMINALS, INC.,
Employer
and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.
c/o ABERCROMBIE, SIMMONS & GILLETTE,
Carrier

Appearances:
Gregory E. Camden, Esq., for Claimant
R. John Barrett, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for permanent partial disability from an injury alleged to have been suffered by Claimant, Nolan Evans, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 948(a). (Hereinafter "the Act"). Claimant alleges that he was injured by being exposed to excessive noise while employed by Employer; and that as a result he is suffering from occupational noise-induced hearing loss.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on July 19, 2001. (TR).[1] Claimant submitted seven exhibits, identified as CX 1 through CX 7, which were admitted without objection (TR. at 10). Employer submitted seven exhibits, EX 1 through EX 7, which were admitted without objection (TR. at 12, 13). The parties submitted eight joint exhibits, identified as JX 1 through JX 8. (TR. at 8). The record was held open for the deposition of August 31 for

[1] EX - Employer's exhibit; CX- Claimant's exhibit; JX- Joint exhibit; and TR - Transcript.

the deposition of Dr. Queen, identified as EX 7. In addition, the record was held open for post hearing briefs.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues are disputed by the parties:

1. Whether Claimant has met his burden of demonstrating that he suffered a harm and that conditions at work could have caused, aggravated or accelerated his condition, and is therefore entitled to the presumption as provided under § 20(a) of the Act;

2. If so, whether the Employer successfully rebutted the § 20(a) presumption;

3. Is so, whether Claimant has established that he is entitled to benefits for hearing loss due to work related noise exposure;

4. Whether Claimant is entitled to hearing aids even if he does not have a compensable hearing loss.

STIPULATIONS

At the hearing, Claimant and Employer stipulated that:

1. That an employer/employee relationship existed at all relevant times;

2. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;

3. That the claimant alleges a noise induced hearing loss which occurred on the job with a date of diagnosis of 11/5/99;

4. That a timely notice of injury was given by the employee to the employer;

5. That a timely claim for compensation was filed by the employee;

6. That the employer filed a timely First Report of Injury with the Department of Labor and timely Notice of Controversion;

7. That the claimant's average weekly wage at the time of his diagnosis was $1,254.96, which resulted in entitlement to benefits resulting in a compensation rate of $836.64;

8. That no benefits have been paid as a result of this injury;

9. That the audiogram performed by Dr. Queen on 11/5/99 meets the requirements of a presumptive audiogram under the Act[2] and demonstrates a binaural hearing loss of 16.6%;

10. That the audiogram performed by Dr. John Jacobson on 9/27/00 meets the requirements of a presumptive audiogram and demonstrates no compensable loss under § 908.

---

[2] Under the Act and its implementing regulations, an audiogram is presumptive evidence of the extent of hearing loss on the date administered if that audiogram was performed in conformance with the requirements set forth at 20 C.F.R. § 702.441(b)(1)-(3) & (d). In order to be presumptive evidence of the extent of hearing loss it must be proven that:

> (1) The audiogram was administered by a licensed or certified audiologist, or by a physician certified by the American Board of Otolaryngology, or by a technician, under an audiologist's or physician's supervision, certified by the Council of Accreditation on Occupational Hearing Conservation, or by any other person considered qualified by a hearing conservation program authorized pursuant to 29 C.F.R. 1910.95(g)(3) promulgated under the Occupational Safety and Health Act of 1970 (29 U.S.C. 667). Thus, either a professional or trained technician may conduct audiometric testing.However, to be acceptable under this subsection, a licensed or certified audiologist or otolaryngologist, as defined, must ultimately interpret and certify the results of the audiogram. The accompanying report must set forth the testing standards used and describe the method of evaluating the hearing loss as well as providing an evaluation of the reliability of the test results.
>
> (2) The employee was provided the audiogram and a report thereon at the time it was administered or within thirty (30) days thereafter.
>
> (3) No one produces a contrary audiogram of equal probative value (meaning one performed using the standards described herein) made at the same time. "Same time" means within thirty (30) days thereof where noise exposure continues or withing six (6) months where exposure to excessive noise levels does not continue. Audiometric tests performed prior to the enactment of Public Law 98-426 will be considered presumptively valid if the employer complied with the procedures in this section for administering audiograms. ...
>
> (d) In determining the loss of hearing under the Act, the evaluators shall use the crieteria for measuring and calculating hearing impairment as published and modified from time-to-time by the American Medical Association in the *Guides to the Evaluation of Permanent Impairment*, using the must currently revised edition of this publication. In addition, the audiometer used for testing the individual's threshold of hearing must be calibrated according to current American National Standard Specifications for Audiometers. ...

20 C.F.R. § 702.441(b)(1)-(3) & (d).

(JX 1).

DISCUSSION OF LAW AND FACTS

Claimant has been a member of the International longshoreman's Association for twenty-five years. (TR. at 14). Since at least November 5, 1998, Claimant has worked exclusively for Virginia International Terminals at their Newport News Terminal as a location checker. (*Id*. at 14-15). As a location checker, Claimant locates containers coming in on the terminal and off ships. (*Id*.at 15-16). Containers are 20 or 40 foot metal boxes that hold cargo. (*Id*. at 16). Claimant does this both on foot and inside a pick-up truck. (*Id*. at 18). He uses a computer, and takes the number of the container and the location on the terminal. (*Id*. at 16). The container will stay in that location until a truck or ship picks it up. (*Id*. at 17). In locating the containers, Claimant drives to the location where the containers are and then keys in the location and container number. (*Id*. at 18). This is all done from inside the truck. (*Id*.). In addition, Claimant testified that when the trucks come on terminal, there is a magnet that is put on the container. (*Id*.). Claimant stated: "And in case I don't see the truck when it's parked, I ride around and I see these magnets, and I collect the magnets off the container. And I have to get out [of the truck] to get those." (*Id*. at 18-19). *See also* (*Id*. at 30). About forty percent of Claimant's time is spent outside the truck, and in the summer the windows of the truck are open because there is no air-conditioning. (*Id*. at 19).

When asked to describe the noise he is exposed to as a location checker, Claimant testified:

> Well you have tractor trailer trucks all around me. You have hustlers around me. You have different types of, you know, machines and so forth like that around that are making noise. ... [The over the road trucks that pull containers on the highway are v]ery close [four or five feet].

(TR. at 17-18). Claimant described hustlers as a version of a tractor trailer truck used solely on the terminal, that would not meet the requirements to drive on a highway. (*Id*. at 19-20). Depending upon how busy the day is, Claimant testified that the number of tractor trailers and hustlers around him at a given time varies. (*Id*. at 20). He stated "It all depends on how busy that day is. It could be numerous or they could be... I would just say an estimate from 75 or more on up. It just depends. That's as far as the trucks coming in and out – the road trucks. The hustlers are there all day." (*Id*.). On a busy day, Claimant testified that three or four vehicles might be around him at one time, if they are parking in that same location. In the general location there may be four or five, maybe more. (*Id*. at 21). Claimant also testified that he is around "top loaders" during the day. (*Id*.). Top loaders were described as machines that move containers and stack them. (*Id*.). He testified that when these machines put the containers down "sometimes it's extremely loud and... Most of the time it's loud when they hit down." (*Id*. at 21-22). Claimant is also around transtainers, which do the same thing as top loaders and makes the same noises, however must go on a certain track instead of driving about freely. (*Id*. at 22-23). Finally, he testified that he is also sometimes exposed to the noise of forklifts. (*Id*. at 22).

Claimant owns about five guns and, although he used to hunt, has not hunted in

approximately six years. (TR. at 26). He stated that he did, however, still go out in the country and shoot his weapons, although he had not in the past year. (*Id*.). There was some confusion in how often this occurred, as Claimant's deposition testimony contradicted his testimony at trial. He finally testified: "I might have shot two or three times. I don't remember shooting at all in the last 6 or 8 months or a year, but it's possible that I might have. I know I haven't been hunting. ... In the past year or so, maybe two or three times if that. I don't know. I don't recall, but it's possible." (*Id*. at 27-28). Claimant does not wear ear protection when he shoots. (*Id*. at 27). Claimant does not wear hearing protection on the job either and none has been provided by Employer since he has worked there. (*Id*. at 32). He does not know where he would go to get any. (*Id*.).

Finally, Claimant described the problems he has been experiencing with his hearing. He stated that he has trouble carrying on a conversation with some people, that there are some words he cannot hear clearly, and that he has trouble talking on the telephone. (TR. at 26). He stated: "It just sounds like different tones that I can't hear or I can't pick up as well as others. Like I said, mainly on the phone or listening to the t.v. or this type of thing like that." (*Id*.).

On November 5, 1999, Claimant went to see Dr. Timothy Queen[3] for a hearing test. (TR. at 23). He chose Dr. Queen because he was recommended by the president of his local union. (*Id*. at 24). He was sent with an assistant of Dr. Queen to have the audiogram done. (*Id*.). Claimant described his audiogram as follows: "I was put in a room and I had ear phones on and they played...punched different keys or notes and different things and talked to me and asked me if I recognized, you know, different notes or sounds or voices or words and this type of thing." (*Id*). Claimant talked to Dr. Queen before and after the exam and thinks Dr. Queen "looked in [his] ears and so forth," but couldn't remember as "it's been a while." (*Id*.). On September 27, 2000, Claimant underwent a second hearing evaluation by Dr. John Jacobson. (EX 1-4). He testified that both audiograms seemed the same to him, both with tones, words and in a separate booth. (*Id*. at 25).

1999 Audiogram

It has been stipulated that Claimant's 1999 audiogram, at the office of Dr. Queen, meets the requirements of a presumptive audiogram and demonstrates a 16.6 percent binaural hearing loss. (JX 1 at Stip. 9). Dr. Queen's interpretation of this audiogram is a mixed hearing loss. (CX 2-2). The accompanying initial assessment and plan indicates a mixed hearing loss, no evidence of "ET problem" and "likely noise induced hifreq loss." (*Id*.). Dr. Queen did not perform speech reception threshold and speech discrimination testing as a routine part of his audiogram at this time. (EX 7 at 8). He agreed, however, that if a speech reception threshold test is done, there should be a relationship between that and the pure tone averages at the 500, 1,000, and 2,000 hertz levels. (*Id*. at 9). He likes to see a match within 10 or 15 decibels, although he

[3] Dr. Queen is an Ear, Nose and Throat physician with a special interest in pediatrics. (EX 7 at 3-4). Dr. Queen testified that, in his training as a resident he was taught by an audiologist with a PhD and, although they practiced them, they did not routinely perform audiograms. (*Id*. at 5). Until the time he got an audiologist on staff, he was routinely reviewing and interpreting audiograms but not performing the actual tests on a routine basis. (*Id*.).

acknowledges that some other people like to see an even closer correlation between the two. (*Id*.).

Dr. Queen also found that Claimant had an air bone gap within his criteria of indicating a medical problem. (EX 7 at 11). He explained that an air bone gap is "the difference between air conduction and bone conduction." (*Id*.). He clarified:

> Air conduction is testing, basically, the entire hearing mechanism. Bone conduction is just measuring the function of the inner ear by vibrating the skull and the cochlear directly. The difference between the two thresholds is the air bone gap, which is a measure of the conductive hearing loss, which would be due to either the ear canal, the eardrum, or the middle ear space.

(*Id*. at 9-10). He stated that ten or less decibels would be acceptable for an air bone gap, anything more would be considered a conductive hearing loss. (*Id*. at 10). Dr. Queen was asked what he thought Claimant's air bone gap in the lower frequencies meant and testified:

> He's got a mixed hearing loss. His tympanograms were normal. So I didn't find fluid in the ear, I didn't find any eustachian tube dysfunction, I didn't find any problems with his ear canals, so he had sort of an unexplained conductive hearing loss, which can sometimes be due to scarring in the middle ear space or scarring of the bones or some dislocation or partial erosion of the middle ear bones. So one possible solution would have been to explore the middle ears to try to find the sight of a conductive hearing loss. He also has a sensorineural hearing loss in the high frequencies, which could be a combination of noise exposure, potentially some aging or familial hearing problems and so forth. The options, basically, that I presented to him were a hearing aid, which would help all of the frequencies of his hearing loss, versus exploring the middle ear, which potentially could help the low frequency hearing, but would not have any effect on the high frequency hearing loss because that was related to the inner ear.

(*Id*. at 11-12). Claimant denied ringing in his ear or tinnitus. (*Id*. at 12).

2000 Audiogram

It has also been stipulated that Claimant's 2000 audiogram, performed by Dr. John Jacobson,[4] meets the requirements of a presumptive audiogram and demonstrates no compensable hearing loss. (JX 1 at Stip. 10). In a letter dated September 29, 2000 to Employer's counsel, Dr. Jacobson wrote:

---

[4] Dr. Jacobson is the director of the audiology program in the Department of Otolaryngology of Eastern Virginia Medical School. (CX 7-3). He has a PhD in audiology, has been director of clinical programs, director of two educational academic settings, and has clinical areas of expertise in electrophysiology and cochlear implant testing and evaluation processes. (CX 7-4). He performs his own audiograms and estimates that he does 500 to 750 audiograms per year. (*Id*. at 4-5).

> Today's audiological test results show bilateral sensory hearing loss. Speech reception thresholds were 10 dB in the right ear and 15 dB in the left ear. Speech recognition scores were 100% bilateral. Tympanometry, a reflection of middle ear compliance, was within normal limits. Acoustic reflex thresholds were present at all test frequencies. Distortion product otoacoustic emissions were absent at all test frequencies for both the right and left ears. DPOAE's are routinely absent when pure tone threshold sensitivity is poorer than approximately 20 to 25 dB. These test results are indicative of abnormal peripheral hair cell function and reflect today's audiometric pure tone test sensitivity. Based on the American Medical Association percentage of a hearing handicap four-frequency average, neither the right or left ear exceeds the minimum standard levels required for compensation consideration. In the calculations for the left ear, I used the bone conduction score at 500 Hz, because a conductive component exists. Conductive components are generally attributed to middle ear pathology, not sensory deficits.
> ...
>
> In summary, when patients present with sensory hearing loss, it is often difficult to differentiate the exact etiology. That is, there are several reasons, both pathologic and non-pathologic, that cause permanent non-reversible sensory hearing loss. Further, noise-induced hearing loss that typically presents with a notched, audiometric pattern in the higher frequencies, may be caused by either longitudinal or impact noise exposure. As such, it is impossible to distinguish which or whether both have contributed to the hearing loss by the resulting audiometric pattern alone. It is also important to appreciate the effects of aging on hearing loss. The available scientific evidence suggests a direct correlation between progressive hearing loss and increased age, due to physiological changes that occur within the auditory mechanism that are independent of external factors such as noise. Finally, hearing loss by one condition (e.g. rifle or handgun fire, or fire cracker explosion) may cause instantaneous hearing loss that is only further worsened by other means of longitudinal exposure. The resulting hearing loss is typically concomitant and always synergistic.

(EX 1 at 2-3).

Dr. Jacobson explains that conductive hearing loss and sensory loss are different and that sensory loss is inner ear pathology and is nonreversible and permanent. Noise induced hearing loss is always going to be sensory. (CX 7 at 16-17). He did indicate that Claimant's audiogram shows some component of conductive loss but did not recommend any treatment or surgery. He stated: "I think that the gap that exists would not even be considered by a physician in terms of correctability. It could be as little as some fluid in the ear canal due to an upper respiratory infection. It could be sinuses that are making the differences." (*Id*. at 17). He and Dr. Queen agreed that there is nothing to do as far as Claimant's conductive loss. (*Id*.). Discussing his opinion, Dr. Jacobson agreed that he did not consider the conductive component of Claimant's hearing loss when writing his report and opining that there was no rating under the AMA Guides, however, he testified that he did not believe that including the conductive component would result in a moderate hearing loss in the right ear. (*Id*. at 17-18.). He explained:

> There's no scores that exceed 100. His four frequency pure tone average does not exceed 100 in either the right or left ears. ... [so that even with the conductive component it doesn't reach the level to fall into any rating]. Even using the air conductive scores, not including the bone conductive scores, there's not a value listed that would exceed the four frequency average of 25.

(*Id*. at 18-19). This opinion is supported by the testimony and opinion of Dr. Henry Hecker.[5] Therefore, Employer argues that Claimant has not suffered an injury as this audiogram shows no compensable loss.

Claimant contends that the audiogram performed by Dr. Queen, demonstrating a 16.6 percent binaural hearing loss is more reliable than the later audiogram, as Dr. Queen is an Ear, Nose & Throat physician. (TR. at 6). Employer contends that, as a location checker, Claimant was not exposed to injurious noise. In addition, Employer argues that Dr. Jacobson performed the most recent and the most accurate audiogram, which shows no compensable loss. (*Id*. at 7). To support this argument, Employer also relies on the testimony of Dr. Hecker. (*Id*.).

Section 20(a) Presumption

Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). In order to invoke the § 20(a) presumption, a claimant must first prove his *prima facie* case. A claimant proves his *prima facie* claim for compensation by establishing two elements: (1) the claimant sustained physical harm or pain, which can include the aggravation or acceleration of a pre-existing injury; and (2) an accident occurred in the course of employment, or conditions existed at work that could have caused the harm or pain of claimant. *See United States Industries/Federal Sheet Metal*, 455 U.S. 608, 615; *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Kier v. Bethlehem Steel Corp*., 16 BRBS 128 (1984); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326, 331(1981).

In hearing loss cases, a claimant's burden is met if there is medical evidence that establishes that the claimant suffers from noise-induced hearing loss, and the claimant testifies that he works or worked around loud machinery. *See Damiano v. Global Terminal & Container Service*, 32 BRBS 251 (1998). *See also Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206, 210 (CRT) (9th Cir. 1998)(holding "[w]e conclude that [Claimant's] uncontradicted testimony that conditions existed at his work that could have caused the harm is

[5] Dr. Hecker is board certified in Audiology and is licensed in the State of Virginia. (TR. at 36). He has a Bachelor's and Master's degree, in addition to going through the recredentialing process and obtaining an Audiology doctorate degree. (*Id*.). He also teaches classes and gives certifications on conducting audiograms, in addition to being involved with medical school faculty. (TR. at 38). Finally, Dr. Hecker was part of a group of audiologists who established the criteria found in the OWCP Hearing Loss Medical Requirements. (TR. at 40-41). *See also* (EX 6)(OWCP criteria).

sufficient to invoke the presumption of section 920(a). Because employers offered no evidence to contradict [Claimant's] testimony, the presumption should have carried into a finding of liability.").

In the instant case, Claimant relies on his November 5, 1999 audiogram to prove he suffers hearing loss. It has been stipulated that this audiogram meets the requirements for a presumptive audiogram. Therefore it is presumptive evidence that Claimant suffered a binaural hearing loss of 16.6% on November 5, 1999. (JX 1 at Stip. 9). In addition, Claimant testified that he has trouble hearing. (TR. at 26). Given Claimant's presumptive evidence of a hearing loss on November 5, 1999, and his testimony, he has proven that he suffered an injury as of November 5, 1999.

Claimant must also prove that conditions existed at work (injurious noise) which could have caused his injury. As discussed in detail *supra*, Claimant testified as to the noise he is exposed to. He stated that he is surrounded by the noise of trucks, forklifts, transtainers and top loaders, and the stacking of containers on top of each other. (TR. at 15-23). In addition, Dr. Queen noted in his initial assessment and plan for Claimant, that he "likely [suffers a] noise-induced hifreq loss." (CX 2-2).

Upon consideration of this evidence, I find that Claimant has met the standard set forth in *Damiano, supra*. He has provided medical evidence and his own testimony supporting the invocation of the presumption. Thus it is presumed pursuant to § 20(a) of the Act, that Claimant suffers hearing loss due to injurious exposure to noise while employed by Employer and that, on November 5, 1999 he had a 16.6 % binaural hearing loss.

Rebuttal of Section 20(a) Presumption

Since the presumption has been invoked, the burden now shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, aggravate, or accelerate his condition. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951); *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229 (1938); *Richardson v. Perales*, 402 U.S. 389 (1971).

To rebut the presumption in a case concerning hearing loss, Employer must present facts that show exposure to injurious stimuli at its facility did not cause Claimant's harm or that the Claimant was exposed to injurious stimuli while employed for a subsequent, covered employer. *Lins v. Ingalls Shipbuilding, Inc*. 26 BRBS 62, 63 (1992) (citing *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149, 151 (1986); *General Ship Service v. Director, OWCP*, 938 F.2d 960 (9th Cir. 1991)). Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by § 20(a). *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990).

In the instant case, Employer relies on the noise surveys of Thomas Bragg,[6] Dr. John Jacobson's September 27, 2000 presumptive audiogram, and the testimony and opinion of both Dr. Henry Hecker and Dr. Jacobson to rebut the presumption.

Employer argues that Claimant's testimony shows that other factors were present that could have caused his hearing loss, including the shooting of guns. (TR. at 25). While Claimant did testify that he occasionally shoots guns, there has been no medical evidence discussing the potential consequences of that assertion. The type of hearing loss such an activity would cause, the amount of exposure that would cause hearing loss and whether or not it constitutes "injurious exposure" have not been established by the evidence set forth. Employer's contention that this activity could have caused Claimant's hearing loss is pure speculation. Further, even if Employer's assertion is taken as true, this does not effectively sever the causal connection between Claimant's employment and his hearing loss. This theory does not address the possibility of Claimant's employment contributing to or aggravating a loss caused by that activity. Therefore the fact that Claimant shoots guns does not constitute substantial countervailing evidence sufficient to rebut the presumption.

Employer also contends that Claimant's testimony regarding the noise he worked with is contradicted by the results of Thomas Bragg's noise survey. (JX 2-8). Mr. Bragg's noise survey of Newport News Marine Terminals, specifically his analysis of the noise exposure of a "checker" indicates that checkers are not exposed to noise in excess of the OSHA regulations. (JX 7 at 26-27). The average rate of exposure was 77.6 time weighted decibels over an 8 hour period. (JX 7 at 29). The highest recorded level, under a top loader, was 89 decibels. (JX 4 at 15); (JX 7 at 26-27). Employer argues that because these results show compliance with the Occupational Safety and Health Administration (OSHA) regulations,[7] they are proof that Claimant was not exposed to injurious levels of noise. However, compliance with OSHA noise exposure standards constitutes "relevant but not determinative evidence of the presence or absence of injurious stimuli." *Damiano*, 32 BRBS at 263. In fact, OSHA regulations advise against regarding their criterion as determinative outside of the OSHA context. 29 C.F.R. § 1910.95. Therefore, although the noise survey is relevant evidence, it is not sufficient, standing alone, to rebut the presumption.

Employer also submitted the September 27, 2000 audiogram performed by Dr. Jacobson as evidence. Employer argues that the 2000 audiogram shows no ratable hearing loss and that it is more reliable than the 1999 audiogram. The parties stipulated that the 2000 audiogram, as well as the 1999 audiogram discussed *supra*, meet the requirements of a presumptive audiogram. (JX

---

[6] Thomas Bragg is a consultant specializing in the evaluation of industrial and community noise. (JX 8 at 1-2). His noise surveys at Portsmouth Marine Terminals, Norfolk International Terminals and Newport News Marine Terminals, along with his testimony in related hearing loss cases have been submitted as joint exhibits. *See* (JX 2-8).

[7] OSHA regulations require noise levels to be below 90 decibels on a time weighted average or a warning to be posted. Further at 85 decibels a hearing conservation program must be implemented. *See* 29 C.F.R. § 1910.95. *See also Forging Industry Ass'n v. Secretary. of Labor*, 773 F.2d 1436 (4th Cir. 1985)(explaining the regulations, legislative history and holding that some employees' hearing could be damaged at levels below the 90 dB threshold).

1 at Stip. 9, 10). A presumptive audiogram is presumptive as to the extent of hearing loss on the date administered. 20 C.F.R. § 702.441(b). Therefore, pursuant to 20 C.F.R. § 702.441(b), it must be presumed that on September 27, 2000, Claimant suffered no ratable hearing loss.

Upon consideration, I find that the September 27, 2000 presumptive audiogram (which shows no ratable hearing loss and was performed after the audiogram upon which this claim is based), together with the noise survey showing average noise levels below OSHA levels, do constitute substantial countervailing evidence which establishes that the claimant's employment did not cause, aggravate, or accelerate his condition. Therefore, the § 20(a) presumption has been successfully rebutted.

Weighing the Evidence

Once the presumption of causation has been successfully rebutted, "the presumption no longer controls and the issue of causation must be resolved based on the evidence as a whole." *Devine v. Atlantic Container Lines, G.I.E.*, 25 BRBS 16, 20-21 (1990). This is what is commonly referred to as the "bursting bubble" theory of the Section 20 (a) presumption. *Brennan v. Bethlehem Steel Corp.*, 7 BRBS 947 (1978). Therefore, Claimant must prove by a preponderance of the evidence that his hearing loss is ratable and that it is causally related to his employment with Employer.

In the instant case, two presumptive audiograms have been admitted into evidence. Although these audiograms are presumptive as to the extent of hearing loss on the date administered, they are contradictory, with the later audiogram showing no hearing loss. Dr. Hecker testified that both the 1999 and 2000 audiogram can not be correct because hearing loss due to bone conduction does not improve over time and the audiograms reflect different bone conduction scores. (TR. at 91). Therefore, the reliability and credibility of the two audiograms must be assessed and weighed accordingly.

Claimant has submitted an audiogram performed by Dr. Queen's office and dated November 5, 1999 showing a binaural hearing loss of 16.6%. (CX 2 at 2); (JX 1 at Stip. 9). The form used to report the results of the test was developed by Dr. Queen, and there is no place on the form where the person giving the audiogram can indicate whether or not the effort or the reliability is fair, good or poor. (EX 7 at 8). The September 27, 2000 audiogram does reflect a reliability indicator, speech recognition scores, and indicates no ratable hearing loss. (EX 1 at 2-3); (CX 7 at 7-9); (JX 1 at 10).

Dr. Queen's audiogram shows an "air-bone gap" in Claimant's hearing. According to Dr. Queen, an air bone gap is "the difference between air conduction and bone conduction." (EX 7 at 9). He clarified:

> Air conduction is testing, basically, the entire hearing mechanism. Bone conduction is just measuring the function of the inner ear by vibrating the skull and the cochlear directly. The difference between the two thresholds is the air bone gap, which is a measure of the conductive hearing loss, which would be due to either the ear canal, the eardrum, or the middle ear space.

(*Id*. at 9-10). He stated that ten or less decibels would be acceptable for an air bone gap, anything more would be considered a conductive hearing loss. (*Id*. at 10). Dr. Queen testified that this meant Claimant suffered a mixed hearing loss, with a "sort of unexplained conductive hearing loss," and a sensorineural hearing loss in the high frequencies. (*Id*. at 11-12).

After comparing his audiogram and the audiogram performed on September 27, 2000 and showing no ratable hearing loss, Dr. Queen was asked:

> If we assume that both your audiogram of November of '99 and John Jacobson's audiogram of September 27th, 2000, we assume those are both accurate when taken, would you have an explanation for the improvement of the hearing measured by John Jacobson?

He replied:

> Sure. I mean, there's different things. The accuracy would depend on the condition of the patient at the time as well as the patient's attentiveness at the time of the test, but the conductive hearing loss improvement certainly could easily be explained by improvement in the middle ear condition. The sensorineural component we're looking here averaging about 35 to 40 decibels in the high frequencies when I performed the test and looking between 25 to 35 or so here. There's probably around a 10 to 15 decibel difference in the high frequencies and day-to-day variability is not inconsistent within 10 decibels. I mean, I could bring the same guy in the next day and if it varied between 10 decibels I wouldn't consider that inaccurate. So he's had some improvement. Typically, sensorineural hearing loss doesn't change over time, but you can have some **temporary threshold shifts** which will occur due to noise exposure, which then if you're away from the noise can improve. A 10 to 15 decibel difference would not make me think that there was anything wrong with the accuracy of the exam. I don't know, and **I did not when I tested him have any documentation as to when his last noise exposure was, so I don't know if there's a temporary loss here that would have improved, but there's an explanation for it.**

(EX 7 at 16-18)(emphasis added). He also stated that, medically, a difference between 10 decibels does not alarm him. (*Id*. at 18). He reiterated that he was not speaking in terms of workers' compensation claims, but rather in terms of medical issues. (*Id*. at 18-19).

Dr. Hecker was also asked to compare the two presumptive audiograms. He has repeatedly opined that the later audiogram, performed by Dr. Jacobson, was more credible and more reliable. (EX 4-1);(TR. at 63, 67). Although Dr. Jacobson's audiogram does show some hearing loss, that loss is not ratable. (TR. at 81); (EX 4-1); (EX 1 at 2-3). In addition, after reviewing Dr. Queen's audiogram, he testified:

> Well, I'd like to add one more thing to this which I said earlier, that there's a great lack of missing pieces from this [November 5, 1999 audiogram]. To me when there's important issues such as an existing hearing loss, in this case there's

> implication for surgical procedure particularly. And there would have to be a considerable more effort put into it to validate the test results. And we see patients in our office for various reasons. Sometimes their test results... these five or six items as outlined in the OWCP Guidelines[8] do not match for whatever reason. And in which case one of the reasons, for example, which is part of the guideline...the Longshoreman Guideline, they have to be away from the job for a certain number of hours. And the reason for that is that goes back to the OSHA Guidelines that **if you have noise exposure prior to the test, you can suffer a temporary threshold which will give you much worse hearing than the actual permanent hearing loss is.** And that's when you have to come back to be retested after you've been away from the noise. On the practical side, that particular aspect turns out to be that if you walk away from a jack hammer and come to the office where the proper equipment and the proper testing facilities exist and your hearing test comes out normal, then obviously this particular requirement doesn't make any difference. However, if you do show a hearing loss, I cannot tell is the hearing loss due to the immediate exposure prior or is it a long-term exposure that was maybe aggravated by the immediate exposure.

(TR. at 68)(emphasis added).

Both Dr. Jacobson's and Dr. Queen's audiograms were reviewed by Dr. Hecker. He opined that Dr. Jacobson's audiogram was the most reliable and that "the criteria for a compensable loss was not met, no hearing loss related to [Claimant's] job." (EX 4-1). As stated *supra*, Dr. Hecker indicated that both audiograms could not be correct, because Claimant's bone conduction loss had improved. (TR. at 91). Both Dr. Hecker and Dr. Queen testified that, at the time of his November 5, 1999 audiogram, Claimant may have been experiencing a temporary threshold shift in his hearing. (TR. at 68); (EX 7 at 16-18). Dr. Jacobson's presumptive audiogram includes reliability information and more closely conforms with the criteria outlined by Dr. Henry Hecker. *See also* (TR. 70 & EX 6)(Department of Labor standards, which have not been codified into federal regulations, for performing audiograms). At best the evidence would be considered in equipoise, and therefore Claimant would not meet his burden of proving a ratable hearing loss caused by his employment.

However, upon consideration of the lack of reliability information for Dr. Queen's audiogram, the lack of evidence regarding noise exposure prior to Dr. Queen's test, and Dr. Queen's own testimony that he did not have any documentation as to when his last noise exposure was and so did not know if there was a temporary loss that would have improved, I accord less

---

[8] The OWCP Hearing Loss Medical Requirements states: "The report which is submitted must include the results of an otological (ENT) examination, conducted by a physician, and the results of an audiological examination administered in a sound-treated booth." (EX 6). The document then proceeds to state what requirements are necessary for both the physician's examination and the audiological evaluation. (*Id.*). Dr. Hecker testified that, technically, neither audiogram meets all of these requirements in that Claimant was not examined by an Ear, Nose and Throat doctor during the second audiogram. (TR. at 72-73). He firmly, opined, however, that Dr. Jacobson's September 27, 2000 audiogram meets the requirements listed for audiological evaluations. (EX 4-1);(TR. at 73-74). It is noted that this document is not codified nor is there any reference of this document within the Act. (TR. at 75).

weight to the test by Dr. Queen. Therefore, I find that the September 27, 2000 audiogram showing no ratable hearing loss is entitled to greater weight than the November 5, 1999 audiogram showing a ratable loss.

Accordingly, I find that Claimant has not established by a preponderance of the evidence that he has a noise induced occupational hearing loss, and his claim must be Denied. As a compensable hearing loss has not been established, the issue of the need for hearing aids is moot.

Order

Accordingly, it is hereby Ordered that:

1. The claim of Nolen P. Evans versus Virginia International Terminals, Inc., for permanent partial disability compensation due to hearing loss, medical benefits and hearing aids is Denied.

2. As compensation has not been awarded, attorney's fees are not awardable.

A

RICHARD E. HUDDLESTON
Administrative Law Judge